BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANGELA M. HAHN Claimant VS. **UNIVERSAL PRODUCTS, INC.** Respondent AND **FIREMANS FUND INSURANCE COMPANY** Insurance Carrier	)	Docket No. 195,861

ORDER

Claimant requests review of the Award entered by Special Administrative Law Judge William F. Morrissey on July 6, 1995. The Appeals Board heard oral argument in Wichita, Kansas on November 8, 1995.

APPEARANCES

Claimant appeared by her attorney, Cortland Q. Clotfelter of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, J. Darin Hayes of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record reviewed by the Appeals Board and the stipulations of the parties are listed in the Award.

ISSUES

The Special Administrative Law Judge awarded claimant permanent partial disability benefits based upon a seven and one-half percent (7½%) functional impairment rating. The claimant requested review of the issues of average weekly wage and nature and extent of disability. The respondent and insurance carrier requested this review be dismissed because claimant failed to file a brief with the Appeals Board as requested. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award of the Special Administrative Law Judge should be modified. Claimant is entitled to permanent partial disability benefits based upon her seven and one-half percent (7½%) functional impairment rating for the period before her termination on January 28, 1994. Commencing January 28, 1994, claimant is entitled to permanent partial disability benefits based upon a sixteen percent (16%) work disability.

(1) At oral argument claimant's counsel agreed that the average weekly wage was $453.58 as found by the Special Administrative Law Judge. That finding is supported by the record and was proposed by the respondent and insurance carrier in their submission letter. Because of claimant's announcement, average weekly wage is no longer an issue for this review.

(2) Claimant is entitled to permanent partial disability benefits based upon a sixteen percent (16%) work disability after she terminated her employment on January 28, 1994, and respondent failed to provide employment paying a comparable wage.

Claimant injured her neck on August 25, 1990 when she was pulling boxes from a stack. After seeing a number of doctors for conservative treatment over a two-year period, in July 1992 claimant underwent a discectomy, decompression and fusion at the C4-5 intervertebral level. After recuperating from surgery, claimant returned to work on a part-time basis from September 1992 through October 18, 1992, after which she returned to work full time in her former supervisory position.

Claimant continued to work for respondent until January 28, 1994 when respondent abolished her job as supervisor. Although she was earning $8.15 per hour at the time, respondent offered claimant three non-supervisory jobs that paid approximately $6.90 per hour. Claimant was given twenty-four (24) hours to decide which job she would take. Rather than transferring to a new position, claimant quit.

Because hers is a "non-scheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 1990 Supp. 44-510e. That statute provides:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Because claimant returned to work at a comparable wage, for the period before her termination on January 28, 1994, we find that claimant is entitled to permanent partial disability benefits based upon her functional impairment rating only. Although the presumption of her work disability is not a conclusive presumption, we find the evidence

does not overcome the presumption for the period claimant remained in respondent's employ. However, once claimant terminated her employment and respondent failed to offer claimant accommodated employment paying a comparable wage, we find the presumption of no work disability is overcome and claimant became entitled to permanent partial disability benefits based upon the higher of her work disability or functional impairment. See Lee v. The Boeing Company-Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995). As the Court stated in Lee, the presumption of no work disability was designed to help prevent a worker from "double-dipping." However, it was not the intent of the legislature to deprive an employee of work disability benefits when the employer does not provide employment paying a comparable wage.

Paul Stein, M.D., performed the surgery on claimant's neck in July, 1992. When Dr. Stein released the claimant, he felt she had a good, solid fusion and, therefore, did not place any specific restrictions on her. As of the date he last saw claimant in January, 1993, he believed claimant had a five percent (5%) functional impairment to the body as a whole as a result of the neck injury. Unless he would examine claimant again, Dr. Stein cannot comment upon claimant's present condition.

Claimant saw Ernest R. Schlachter, M.D., at her attorney's request in December, 1993. Dr. Schlachter diagnosed status following C4-5 discectomy with residual limited motion of the cervical spine. He believes claimant has a ten percent (10%) functional impairment and should be restricted from repetitively lifting more than fifteen (15) pounds with either hand and limit single lifts to twenty (20) pounds with either arm or hand and only with her elbows at her side. Also, claimant should avoid working above the horizontal and perform no repetitive pushing or pulling with either arm. Finally, claimant should not turn her head sharply to the left or right.

The Appeals Board agrees with the analysis of the Special Administrative Law Judge that claimant has sustained a seven and one-half percent (7½%) functional impairment as a result of her neck injury. The Appeals Board finds no reason to disturb that finding as it appears reasonable and supported by the evidence.

The Appeals Board finds claimant's actual restrictions fall somewhere between those set forth by Dr. Schlachter and the complete lack of restrictions from Dr. Stein. As indicated by Dr. Schlachter, claimant does have some psychogenic overlay.

The Appeals Board finds claimant has lost approximately twelve percent (12%) of her ability to earn a comparable wage as a result of her work-related injury. This finding is based both upon Jerry Hardin's testimony that claimant could perform work paying approximately $6.50 per hour and the testimony of respondent's director of human resources, Randy Stockman, that respondent could accommodate any restrictions that claimant may have with jobs paying up to $6.75 or $7.00 per hour. The twelve percent (12%) loss is derived by comparing claimant's hourly rate of $7.85, which claimant was earning on the date of accident, to the hourly rate of $6.90, which the Appeals Board finds claimant may now earn. The $6.90 hourly rate is the amount respondent offered to claimant and we, therefore, find that is evidence of claimant's present ability to earn.

The Appeals Board finds claimant has lost approximately twenty percent (20%) of her ability to perform work in the open labor market as a result of her work-related injury. We derive the twenty percent (20%) by averaging the zero percent (0%) loss of ability to perform work in the open labor market, assuming Dr. Stein is correct that claimant needs

no work restrictions, and the thirty-five to forty percent (35-40%) loss expressed by Mr. Hardin when he utilized Dr. Schlachter's restrictions. As indicated above, we believe claimant's actual restrictions fall somewhere between the extremes indicated by the doctors.

The Appeals Board is not required to weigh equally loss of ability to perform work in the open labor market and the loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor greater weight and accordingly they will be weighed equally. The result is an average between the twenty percent (20%) loss of ability to perform work in the open labor market and the twelve percent (12%) loss of ability to earn a comparable wage resulting in a sixteen percent (16%) work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

Based upon the above, the Appeals Board finds claimant is entitled to permanent partial disability benefits based upon her functional impairment rating of seven and one-half percent (7½%) for the period before January 28, 1994 and permanent partial disability benefits based upon a work disability of sixteen percent (16%) commencing January 28, 1994.

(3) The respondent and insurance carrier requested this review be dismissed because claimant failed to file a brief with the Appeals Board as requested. Because the Appeals Board currently lacks statutory and regulatory authority to dismiss a review for noncompliance of submission of briefs, the Appeals Board must deny the respondent and insurance carrier's request for dismissal.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey entered in this proceeding on July 6, 1995 be modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Angela M. Hahn, and against the respondent, Universal Products, Inc., and its insurance carrier, Firemans Fund Insurance Company, for an accidental injury which occurred August 25, 1990 and based upon an average weekly wage of $453.58, for 7.71 weeks of temporary total disability compensation at the rate of $278.00 per week or $2,143.38, and 1.67 weeks of temporary partial disability compensation at the rate of $278.00 per week in the sum of $464.26 followed by 169.33 weeks of permanent partial compensation at the rate of $22.68 per week or $3,840.40 for a 7.5% permanent partial general disability, followed by 236.29 weeks at the rate of $48.38 per week or $11,431.71 for a 16% permanent partial general disability making a total award of $17,879.75.

As of December 22, 1995, there is due and owing claimant 7.71 weeks of temporary total disability compensation at the rate of $278.00 per week or $2,143.38, and 1.67 weeks of temporary partial disability compensation at the rate of $278.00 per week in the sum of $464.26, followed by 169.33 weeks at the rate of $22.68 or $3,840.40 for a 7.5% permanent partial disability, followed by 99.15 weeks at the rate of $48.38 or $4,796.88 for a 16% permanent partial disability for a total of $11,244.92 which is ordered paid in one

lump sum less any amounts previously paid. The remaining balance of $6,634.83 is to be paid for 137.14 weeks at the rate of $48.38 per week, until fully paid or further order of the Director.

Future medical benefits may be awarded only upon proper application to and approval of the Director. Unauthorized medical expense up to $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved to the extent as it complies with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed to the respondent to be paid as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Deposition Services	
Transcript of Regular Hearing	$329.10
Kelley, York & Associates	
Deposition of Paul Stein, M.D.	$181.29
Deposition of Ernest R. Schlachter, M.D.	$270.30
Deposition of Jerry D. Hardin	$272.80
Deposition of Randy Stockman	$303.40
Deposition of Gerry Schaal	$157.60

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Cortland Q. Clotfelter, Wichita, KS
J. Darin Hayes, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director